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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PATTON LEAVER and MARGE	:	
LEAVER,	:	
	:	
Plaintiff-Appellants,	:	
	:	
vs.	:	Case No. 14722
	:	
RUTH GROSE,	:	
	:	
Defendant-Respondent.	:	

BRIEF OF PLAINTIFF-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an action to enforce restrictive covenants of a subdivision located in Salt Lake County, State of Utah, and to enjoin the respondent from utilizing a residence located in that subdivision as a duplex dwelling.

DISPOSITION IN LOWER COURT

Subsequent to the filing of the complaint and answer in this action, plaintiff-appellants moved for partial summary judgment that certain restrictive covenants applicable to the defendant-respondent's property were enforceable and still in effect. (R. p. 17)

After hearing on plaintiff-appellants' motion, Judge Marcellus K. Snow denied plaintiff-appellants' motion for partial summary judgment and on July 27, 1976, entered

an order that the "Building Restrictions of Loganview Sub-division" were not enforceable as to any violation of those restrictions committed after May 12, 1972. (R. p. 30)

RELIEF SOUGHT ON APPEAL

Plaintiff-appellants ask that the judgment of the Lower Court be reversed and this matter remanded with directions that the restrictive covenants in question in this matter are in full force and effect and that a trial be held to determine the merits of the defendant-respondent's defenses raised in her answer.

STATEMENT OF FACTS

Appellants commenced an action on May 11, 1976, in the District Court of Salt Lake County, State of Utah, seeking to enjoin the use of the property adjacent to their home, and owned by the respondent, from being utilized as a duplex dwelling. Both the residence of the appellants and that of the respondent are located within the boundaries of "Loganview Subdivision" in Salt Lake County, State of Utah.

On May 12, 1947, "Building Restrictions" restricting the use of certain properties in Loganview Subdivision to single-family residences were filed in the office of the Salt Lake County Recorder. Both appellants and respondent purchased their respective properties subsequent to May 12,

1947. Prior to the filing of the appellants' complaint in the Court below, the respondent commenced alterations upon her property with the intent to convert and utilize that dwelling as a duplex.

On July 6, 1976, appellants moved for partial summary judgment on the issue of the enforceability of the "Building Restrictions". The District Court denied appellants' motion for partial summary judgment and entered what constitutes summary judgment in behalf of the respondent that the restrictions could not be enforced by the appellants since the actions complained of occurred after May 12, 1972, (twenty-five years after the "Building Restrictions" were originally filed) and that the respondent did not have notice that the restrictions were still in full force and effect after May 12, 1972. (R. p. 30)

The plaintiff-appellants appeal from the ruling of Judge Snow upon the grounds that the building restrictions were properly filed and the defendant-respondent had constructive notice of those restrictions and that the Lower Court erred in ruling the restrictive covenants had expired on May 12, 1972.

ARGUMENT

Point I

THE DEFENDANT HAD NOTICE OF THE
COVENANTS RESTRICTING THE USE OF
HER PROPERTY TO A "SINGLE-FAMILY
RESIDENCE".

The following set of facts is undisputed in this action:

1. That restrictive covenants (R. pps. 20-22) were duly filed in the Salt Lake County Recorder's Office on May 12, 1947.

2. The real property owned by the appellants and the respondent were subject to those restrictions at the time of the filing. (Plaintiff's Complaint, paragraph 2, R. p. 2; Defendant's Answer, paragraph 2, R. p. 11)

3. That the plaintiffs and defendant both acquired their respective properties subsequent to May 12, 1947.

The statutory provisions that the Lower Court was required to apply to such facts are found in §57-3-2, Utah Code Annotated (1953):

Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or approved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the Office of the County Recorder shall, from the time of filing the same with the Recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice.

It was error for the Lower Court to rule that the respondent had no notice of the provisions of the restrictive covenants since said notice was imparted by the above-cited statute to the respondent.

The ultimate issue is not one of notice to the respondent but whether or not the restrictive covenants at issue in this action expired on May 27, 1972, or were extended by the terms of those covenants until May 27, 1982. This issue is treated below.

Point II

THE RESTRICTIVE COVENANTS WERE CREATED FOR AN INITIAL TWENTY-FIVE YEAR TERM WHICH ENDED MAY 12, 1972. A MAJORITY OF THE LANDOWNERS SUBJECT TO THOSE COVENANTS DID NOT VOTE TO TERMINATE THEM PRIOR TO MAY 12, 1972, AND THE COVENANTS WERE THEREBY AUTOMATICALLY EXTENDED FOR TEN YEARS OR UNTIL MAY 12, 1982. ALTERNATIVELY, A TRIAL SHOULD HAVE BEEN HELD TO OBTAIN EVIDENCE AS TO THE INTENTIONS OF THE ORIGINAL PARTIES TO THE RESTRICTIVE COVENANTS.

The validity or enforceability of the substance of the building restrictions (R. pps. 20-22) are not at issue in this appeal. This Court upheld covenants which are exactly the same as those cited below in the matter of Freeman v. Gee, 18 Utah 2d 339, 423 P.2d 155 (1967). The issue before this

Court is the time frame that the makers of the restrictive covenants intended at the time of the filing on May 12, 1947.

The pertinent provisions of the "Building Restrictions" are:

(i)

Each and every lot above-described shall be known and is hereby designated as a "Residential Lot" and no structure shall be erected, altered, placed or permitted to remain on any such "Residential Lot" other than one detached single-family dwelling not to exceed two stories in height and a private garage for no more than (3) automobiles. (R. p. 20)

(xiii)

All covenants and restrictions herein stated and set forth shall run with the land and shall be binding on all the parties and persons claiming any interest in said residential lots hereinbefore described or any part thereof until twenty-five (25) years from the date hereof, at which time the said covenants and restrictions shall be automatically extended for successive periods of ten (10) years unless, by a vote of a majority of the then owners of said residential lots, it is agreed to change the said covenants in whole or in part. (R. p. 22)

Respondent has admitted in her answer that she commenced alterations upon her property for the purpose of utilizing the property as a duplex rental unit. (R. p. 11)
The respondent, and evidently the District Court, relied on

paragraph (xiv) of the "Building Restrictions" (R. p. 22) that the restrictive covenants were not enforceable twenty-five years from the date of their recordation. This paragraph in no way diminishes or prohibits enforcement of the restrictive covenants after the initial twenty-five year term. The appellants have standing to enforce the restriction on single-family residences without an express grant of authority as is demonstrated by Parrish v. Richards, 8 U.2d 419, 336 P.2d 122 (1959), and Metropolitan Investment Company v. Sine, 14 U.2d 36, 376 P.2d 940 (1962).

The restrictive covenants (R. pps. 20-22) are absolutely clear. The initial term was for a period of twenty-five years (May 27, 1972) and thereafter was automatically extended for a period of ten years unless a vote of a majority of the owners of the residential lots had chosen to alter those restrictions. It is conceded that no such action has been taken.

Assuming for the moment that an ambiguity does exist in the covenants, the Court must ascertain the intentions of the original parties to the covenants. Parrish v. Richard, supra. The intention of Richard Hoyt and Maude Hoyt at the time they executed and filed the "Building Restrictions" (R. pps. 20-22) was to restrict the use of the property in question to single-family residential use.

Loganview Subdivision is located immediately west of Foothill Drive and 2300 East and north of 1700 South in Salt Lake City, Utah. Except for the area of Foothill Village to the north, the area is utilized for residential dwellings. The covenants clearly express an intention that the owners of property in Loganview Subdivision retain those many benefits attendant to family neighborhoods. The Hoyts did provide, in paragraph (xiii) of the covenants, that a majority of the landowners might voluntarily choose to alter the nature of their neighborhood but that event has not occurred.

The intention of these "Building Restrictions" (R. pps. 20-22) are further buttressed by paragraph (xv) which states:

Invalidation of any one of the covenants and restrictions hereinbefore set forth by judgment or court order shall in no wise affect any of the other provisions hereof which shall remain in full force and effect until twenty-five years from the date hereof subject to automatic extension as provided in paragraph (xiii) hereof.

The Hoyts envisioned that if any paragraph in the restrictive covenants was ruled invalid, that the remaining provisions should remain in full force and effect for the original twenty-five year term and be automatically extended for ten-year periods in the event the landowners did not act to remove them.

In the memorandum submitted by counsel for the respondent before the District Court, counsel for the respondent relies on several cases clearly distinguishable to the action pending here. In the matter of Eckard v. Smith, 527 P.2d 660 (Utah 1972), the action before the court was one for specific performance under a first option. While the intentions of the parties were important in that matter, the case was decided upon the issue that the option to sell was a privilege to be exercised only in the event the seller desired to convey the real property to the buyer. In that action the seller did not choose to convey that property and therefore specific performance was denied. In Pitcher v. Lauritzen, 18 U.2d 368, 423 P.2d 491 (1967), the seller brought an action for the value of hay removed from his property and the buyer, in turn, counterclaimed for specific performance of a "contract" to purchase the property. While an earnest money agreement had been executed, no final contract had been consummated. Therefore, the court declined to order specific performance. It is submitted that these cases do not apply to the covenants now before the Court in that these covenants represent a clear and final expression of the intent of the original makers.

Counsel for respondent also relied upon Parrish v. Richards, 8 U.2d 419, 336 P.2d 122 (1959), (R. p. 26), which counsel for appellants

has cited earlier in this brief. In the Parrish action, suit was brought to enjoin the maintenance of a tennis court as violating a restrictive covenant against other than single-family dwellings. Counsel for the respondent further set forth a portion of the Court's opinion in the Parrish action that this Court found:

The trial court followed the correct doctrine that in the construction of uncertain or ambiguous restrictions the court will resolve all doubts in favor of the free and unrestricted use of property . . . 336 P.2d 123 (R. p. 26)

What was deleted from the Court's opinion was the necessity to analyze the intention of the parties as to the purpose of the restrictive covenants and the Court, in that portion of the opinion deleted by counsel for the respondent, went on to state:

. . . and that it will 'have recourse to every aid, rule or canon of construction to ascertain the intention of the parties'. [Citing Reese Howell Company v. Brown, 48 Utah 142, 158 Pac. 684, 687 (1916)]

The Lower Court further erred in summarily ruling that the "Building Restrictions" of Loganview Subdivision were not enforceable against the respondent since the restrictive covenants can only be ruled a nullity if supported by clear and convincing evidence. Metropolitan Investment

Company v. Sine, 14 U.2d 419, 376 P.2d 940 (1962). The court must take evidence as to the intentions of the parties, the purpose of the restriction, and the surrounding circumstances of the case, which was not done. Metropolitan Investment Company v. Sine, supra.

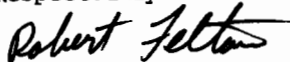
CONCLUSION

The respondent had notice, as provided by law, of the restrictive covenants in effect as to her property in Loganview Subdivision. Twenty-five years subsequent to their filing (May 12, 1972), those restrictions were automatically extended for a ten-year period (until May 12, 1982) because a majority of the landowners did not take affirmative action to alter the character of their neighborhood. The surplus paragraph in the restrictive covenants giving a cause of action to the landowners to enforce the covenants has no effect of altering substantive restrictions running with the property in that area.

A trial should be held to determine the intentions of the parties who originally executed the restrictive covenants, the purpose of the restrictions, and the attendant circumstances.

The order of the District Court should be reversed.

Respectfully submitted,



ROBERT FELTON

Attorney for Plaintiff-Appellants

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